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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Aug 11, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JASON B.,

Plaintiff,

v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:19-CV-03195-JTR

ORDER GRANTING IN PART
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
REMANDING FOR ADDITIONAL
PROCEEDINGS

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 13, 14. Attorney D. James Tree represents Jason B. (Plaintiff); Special Assistant United States Attorney Justin Lane Martin represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS IN PART** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

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1 JURISDICTION

2 Plaintiff filed an application for Supplemental Security Income on June 8,
3 2016, alleging disability since June 1, 2016, due to back injury and pain, bilateral
4 shoulder pain, cervical degenerative disc disease, arthritis, bilateral carpal tunnel
5 syndrome, bilateral knee pain, gout, depression, obesity, and torn ligaments/
6 stretched cartilage. Tr. 256-57. The application was denied initially and upon
7 reconsideration. Tr. 291-94, 298-300. Administrative Law Judge (ALJ) Marie
8 Palachuk held a hearing on June 20, 2018, Tr. 197-236, and issued an unfavorable
9 decision on August 24, 2018, Tr. 175-87. Plaintiff requested review of the ALJ's
10 decision from the Appeals Council. Tr. 367-69. The Appeals Council denied the
11 request for review on June 25, 2019. Tr. 1-6. The ALJ's August 2018 decision is
12 the final decision of the Commissioner, which is appealable to the district court
13 pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on
14 August 21, 2019. ECF No. 1.

15 STATEMENT OF FACTS

16 Plaintiff was born in 1976 and was 40 years old as of the filing of his
17 application. Tr. 186. He did not complete high school and did not obtain his GED.
18 Tr. 229, 530. His work history has been minimal, consisting of various laboring,
19 delivery, and inventory work. Tr. 230, 390, 403. In 2006 he experienced an on-the-
20 job injury to his back, and eventually had fusion surgery in 2007. Tr. 519, 646,
21 705, 732. Several years later he was in a motor vehicle accident that exacerbated
22 various pain issues. Tr. 488, 509, 647. Since filing his application, he has reported
23 chronic pain issues in his back, neck, and extremities, and depression stemming
24 from his chronic pain.

25 STANDARD OF REVIEW

26 The ALJ is responsible for determining credibility, resolving conflicts in
27 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
28 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with

1 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
2 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
3 only if it is not supported by substantial evidence or if it is based on legal error.
4 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
5 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at
6 1098. Put another way, substantial evidence is such relevant evidence as a
7 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*
8 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one
9 rational interpretation, the Court may not substitute its judgment for that of the
10 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,
11 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the
12 administrative findings, or if conflicting evidence supports a finding of either
13 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*
14 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision
15 supported by substantial evidence will be set aside if the proper legal standards
16 were not applied in weighing the evidence and making the decision. *Brawner v.*
17 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

18 **SEQUENTIAL EVALUATION PROCESS**

19 The Commissioner has established a five-step sequential evaluation process
20 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *Bowen v.*
21 *Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of
22 proof rests upon the claimant to establish a *prima facie* case of entitlement to
23 disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a
24 claimant establishes that a physical or mental impairment prevents the claimant
25 from engaging in past relevant work. 20 C.F.R. § 416.920(a)(4). If a claimant
26 cannot perform past relevant work, the ALJ proceeds to step five, and the burden
27 shifts to the Commissioner to show (1) the claimant can make an adjustment to
28 other work; and (2) the claimant can perform specific jobs that exist in the national

1 economy. *Batson v. Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-
 2 1194 (2004). If a claimant cannot make an adjustment to other work in the national
 3 economy, the claimant will be found disabled. 20 C.F.R. § 416.920(a)(4)(v).

4 **ADMINISTRATIVE DECISION**

5 On August 24, 2018, the ALJ issued a decision finding Plaintiff was not
 6 disabled as defined in the Social Security Act. Tr. 175-87.

7 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
 8 activity since the application date. Tr. 178.

9 At step two, the ALJ determined Plaintiff had the following severe
 10 impairments: gout; degenerative disc disease of the lumbar and cervical spine;
 11 minimal osteoarthritis of the right knee; minimal osteoarthritis of the right
 12 shoulder; obesity; depressive disorder; somatic symptom disorder; and marijuana
 13 use disorder. *Id.*

14 At step three, the ALJ found Plaintiff did not have an impairment or
 15 combination of impairments that met or medically equaled the severity of one of
 16 the listed impairments. Tr. 179-80.

17 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found
 18 he could perform a range of light work, with the following limitations:

19 His ability to stand and walk is limited to four hours, so he needs the
 20 ability to alternate between sitting and standing every 60-90 minutes;
 21 he can push and pull with the right upper extremity frequently; he can
 22 frequently use foot pedals bilaterally; he can occasionally climb ramps
 23 and stairs; he can occasionally balance, stoop, kneel, crouch, and
 24 crawl; he can never climb ladders, ropes, or scaffolds; he can handle
 25 [or] finger frequently; he can never reach above the chest level with
 26 his right upper extremity; he can reach at the chest level with his right
 27 upper extremity on an occasional basis; he has no limitation in his
 28 ability to reach below chest level; he must avoid concentrated
 exposure to industrial vibration and all exposure to hazards; he is able
 to understand, remember, and carry out simple, repetitive tasks and
 instructions; he is able to maintain attention and concentration for

1 two-hour intervals between regularly scheduled breaks; he must have
2 a predictable environment with [sic] seldom changes; he can have no
3 judgment or decision making; he cannot perform fast-paced
4 production rate of work; he can have brief, occasional, and superficial
5 (defined as non-collaborative/no teamwork) interactions with public,
6 coworkers, and supervisors.

7 Tr. 180-81.

8 At step four, the ALJ found Plaintiff was unable to perform his past relevant
9 work as an inventory clerk or nursery laborer. Tr. 186.

10 At step five, the ALJ found that, considering Plaintiff's age, education, work
11 experience and residual functional capacity, there were jobs that existed in
12 significant numbers in the national economy that Plaintiff could perform,
13 specifically identifying the representative occupations of small parts assembler,
14 collator operator, and house sitter. Tr. 186-87.

15 The ALJ thus concluded Plaintiff was not under a disability within the
16 meaning of the Social Security Act at any time from the date the application was
17 filed through the date of the decision. Tr. 187.

18 ISSUES

19 The question presented is whether substantial evidence supports the ALJ's
20 decision denying benefits and, if so, whether that decision is based on proper legal
21 standards.

22 Plaintiff contends the Commissioner erred by (1) failing to exhibit and
23 consider relevant evidence; (2) improperly evaluating the medical opinions; (3)
24 improperly discounting Plaintiff's subjective statements; and (4) making
25 insufficient step five findings.

26 DISCUSSION

27 1. Medical opinions

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1 Plaintiff argues the ALJ erred in evaluating the medical opinion evidence
2 from Drs. Asher, Patterson, Cline, Wachsmuth, Kraft, Eisenhauer, and Crank, and
3 ARNP Bruce. ECF No. 13 at 6-18.

4 ***a. Standards***

5 When a treating or examining physician's opinion is not contradicted by
6 another physician, the ALJ may reject the opinion by citing "clear and convincing"
7 reasons; when an opinion is contradicted by another physician, the ALJ is only
8 required to provide "specific and legitimate reasons," based on substantial
9 evidence, to reject the opinion. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir.
10 1995); *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995). The specific and
11 legitimate standard can be met by the ALJ setting out a detailed and thorough
12 summary of the facts and conflicting clinical evidence, stating her interpretation
13 thereof, and making findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.
14 1989). The ALJ is required to do more than offer her conclusions, she "must set
15 forth [her] interpretations and explain why they, rather than the doctors', are
16 correct." *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).

17 Plaintiff argues that all of the opinions regarding his mental functioning are
18 consistent with each other, and the ALJ was thus required to offer clear and
19 convincing reasons for discounting any of them. ECF No. 13 at 6-9. The Court
20 finds some of the opinions contradict each other, and the ALJ was therefore only
21 required to offer specific and legitimate reasons for the weight given to the treating
22 and examining sources. The opinions from the state agency doctors and Dr. Cline
23 found no more than moderate limitations, while several other doctors found
24 marked and disabling limitations. *Compare* Tr. 266-67, 284-85, 724-25 with Tr.
25 219-21, 531, 642-43.

26 The Commissioner may reject the opinion of a non-examining physician by
27 reference to specific evidence in the medical record. *Sousa v. Callahan*, 143 F.3d
28 1240, 1244 (9th Cir. 1998).

1 An ALJ may discount the opinion of an “other source,” such as a nurse
2 practitioner, if she provides “reasons germane to each witness for doing so.”
3 *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

4 ***b. Dr. Asher, psychological medical expert at the hearing***

5 At the hearing, Dr. Kenneth Asher testified as a psychological medical
6 expert. Tr. 214-22. Dr. Asher identified Plaintiff’s impairments as including
7 depressive disorder, somatic symptom disorder (pain disorder with psychological
8 factors), and marijuana use disorder. Tr. 215. He evaluated the paragraph B criteria
9 as being no greater than moderate, and therefore opined Plaintiff’s conditions did
10 not meet or equal a listing. Tr. 218. In terms of functional limits, he stated he
11 believed Plaintiff to be capable of simple routine tasks, and that he was not able to
12 maintain concentration and consistent functioning for two hour stretches over an
13 eight-hour day. Tr. 219-20.

14 The ALJ summarized this opinion in the decision, Tr. 182, and assigned it
15 significant weight, noting the opinion was supported with “detailed references to
16 the longitudinal record,” and finding it to be “generally consistent with that record”
17 and with other opinions. Tr. 185.

18 Plaintiff argues the ALJ erred in failing to address or incorporate Dr. Asher’s
19 opinion that Plaintiff was unable to maintain concentration and functioning for two
20 hour stretches. ECF No. 13 at 9. Defendant argues Dr. Asher did not identify
21 specific functional limitations, and merely stated he believed he recalled seeing
22 such limits in other opinions, but was not able to view the disc of evidence at the
23 time he was testifying. ECF No. 14 at 11-12. Defendant further asserts the ALJ
24 offered adequate reasons for discounting the other opinion evidence that Dr. Asher
25 said was consistent with his opinion (Dr. Patterson and Dr. Wachsmuth), and thus
26 any error in failing to mention Dr. Asher’s testimony regarding Plaintiff’s ability to
27 maintain attention was harmless. *Id.*

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1 The Court finds the ALJ's discussion was insufficient. In summarizing Dr.
2 Asher's testimony, the ALJ failed to mention his statements regarding Plaintiff's
3 inability to maintain attention and concentration for two-hour intervals. Tr. 182.
4 She stated only that Dr. Asher testified "that the claimant would have a number of
5 mental limitations, adopted above." *Id.* By failing to accurately summarize the
6 medical expert's testimony, the ALJ omitted significant, probative evidence
7 without offering any reasons.

8 The Court finds this was not a harmless error. It is unclear from the record
9 how the ALJ considered Dr. Asher's testimony regarding Plaintiff's ability to
10 sustain attention and concentration, given her failure to include that portion of his
11 testimony in her summary or decision. Additionally, as discussed below, the Court
12 finds the ALJ did not give legally sufficient reasons for rejecting Dr. Patterson's
13 opinion, and those reasons therefore cannot be inferred to apply to Dr. Asher. The
14 Court further does not agree with Defendant's characterization of Dr. Asher's
15 testimony as merely recalling that such limits were included by other doctors; Dr.
16 Asher endorsed limitations on sustained concentration and persistence. Tr. 220.

17 On remand the ALJ will reconsider Dr. Asher's testimony in full, and
18 explain the rationale for the weight assigned.¹

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21 ¹ The Court notes that Dr. Asher's testimony included the qualifier that
22 Plaintiff's marijuana use may have been impacting his motivation and ability to
23 maintain attention and concentration. Tr. 217, 219. The hypothetical the ALJ posed
24 to the vocational expert included Plaintiff's abilities "absent the use of marijuana."
25 Tr. 231. However, the ALJ found marijuana use to be a severe impairment. Tr.
26 178. If substance use is material to the finding of disability, the ALJ must make
27 specific findings to that point. Social Security Ruling 13-2p. On remand, the ALJ
28 should clarify her findings with respect to the materiality of substance use.

1 ***c. Dr. Patterson, consultative examiner***

2 In October 2016 Plaintiff underwent a consultative psychological exam with
 3 Dr. Alexander Patterson, who diagnosed Plaintiff with major depressive disorder.
 4 Tr. 642. Dr. Patterson opined that Plaintiff would not have difficulty performing
 5 simple and repetitive or detailed and complex tasks, and would not have difficulty
 6 accepting instructions from supervisors, performing work activities without special
 7 instruction, or maintaining regular attendance. Tr. 642-43. However, Dr. Patterson
 8 also found Plaintiff would have difficulty interacting with coworkers and the
 9 public, would have difficulty completing a normal workday without interruptions
 10 from psychiatric conditions, and would have difficulty dealing with usual stress in
 11 the workplace. Tr. 643.

12 The ALJ gave Dr. Patterson's opinion significant weight, finding it to be
 13 generally consistent with his own examination, the remaining record, and Dr.
 14 Alexander's² opinion. Tr. 185. The ALJ went on to note the difficulties Dr.
 15 Patterson found with respect to dealing with stress and completing a normal
 16 workday, and found that those difficulties had been addressed "by including
 17 limitations on the stress the claimant would be expected to encounter in the
 18 workplace by removing fast-paced work, judgments, and requiring a predictable
 19 environment." *Id.*

20 Plaintiff argues the ALJ's opinion fails to actually account for the difficulties
 21 noted by Dr. Patterson, as the RFC does not account for difficulty completing a
 22 normal workday and even a reduction to low-stress jobs does not address
 23 Plaintiff's difficulty dealing with the usual stress of the workplace. ECF No. 13 at
 24

25 ² Dr. Alexander was the medical expert at the hearing; Dr. Asher was the
 26 psychological expert. Presumably the ALJ meant to say Dr. Patterson's opinion
 27 was consistent with Dr. Asher, not Dr. Alexander, as in the preceding paragraph
 28 she found Dr. Asher's opinion to be supported by Dr. Patterson. Tr. 185.

1 9-10. Defendant argues Plaintiff has failed to identify with any specificity what
2 limitations the ALJ improperly omitted or should have included in the RFC. ECF
3 No. 14 at 9-10.

4 The Court finds the ALJ failed to adequately address Dr. Patterson's
5 opinion. It is unclear how limitations on the stress level of a job incorporate Dr.
6 Patterson's opinion that Plaintiff would have difficulty completing a normal
7 workday without psychological interruptions. Dr. Patterson indicated this
8 limitation was due to Plaintiff's "chronic severe depression which contributes to
9 distractibility and poor persistence." That deficiency is not addressed by limiting
10 him to simple routine tasks with few changes and no fast-paced work, and appears
11 contrary to the ALJ's finding that Plaintiff is able to maintain attention and
12 concentration for two-hour intervals. Tr. 181.

13 On remand the ALJ will reconsider Dr. Patterson's opinion in full and offer
14 reasons for the weight assigned.

15 ***d. Dr. Wachsmuth and Dr. Cline, consultative examiners***

16 Plaintiff was examined by Dr. Wendi Wachsmuth in July 2016 for the
17 Washington Department of Social and Health Services (DSHS). Dr. Wachsmuth
18 diagnosed Plaintiff with persistent depressive disorder, and opined he would be
19 mildly to moderately impaired in most areas of work-related functioning, but that
20 he would have marked limitations in performing activities within a schedule,
21 maintaining regular attendance, and being punctual within customary tolerances
22 without special supervision. Tr. 530-31. She opined the limitations would persist
23 for three months with available treatment. Tr. 532.

24 Plaintiff attended another DSHS consultative exam with Dr. Rebekah Cline
25 in June 2017. Dr. Cline diagnosed Plaintiff with marijuana use disorder,
26 unspecified depressive disorder (rule out substance exacerbated), and provisional
27 unspecified personality disorder. Tr. 724. She found him to be no more than
28 moderately limited in any work-related functional category, and opined the

1 limitations were likely to persist for six months. Tr. 724-25. She further
2 commented that it seemed “likely that his ongoing marijuana use is decreasing his
3 motivation, increasing his depression and assisting in keeping him ‘stuck.’” Tr.
4 725.

5 The ALJ gave Dr. Wachsmuth’s opinion little weight, noting that many of
6 the objective findings on exam were within normal limits, and that the opinion was
7 well below the durational period, as she opined the assessed limitations would only
8 persist for a period of three months. Tr. 185. Similarly, the ALJ gave Dr. Cline’s
9 opinion little weight, noting it was a cursory, one-time examination that “relied
10 heavily on the claimant’s self-reports” and only applied for a limited duration. *Id.*³

11 Plaintiff argues the ALJ’s rejection of each of these opinions reflects the
12 ALJ improperly substituting her own judgment of the relevance of the objective
13 findings by each doctor. ECF No. 13 at 10-13. He further asserts that the limited
14 duration opined by each doctor is of minimal importance when considering the
15 ALJ’s own finding that Plaintiff’s mental impairments were severe for the entire
16 relevant period, and when considering all of the opinions together. *Id.* Plaintiff
17 further argues that the ALJ inconsistently applied the fact that Dr. Cline’s opinion
18 was a one-time exam, given that the ALJ assigned great weight to Dr. Patterson,
19 who also only examined Plaintiff once, and Dr. Asher, who never examined
20 Plaintiff. ECF No. 13 at 10-11. Defendant argues that the ALJ reasonably
21

22 ³ The ALJ also stated Dr. Cline’s opinion “is internally consistent with his
23 minimal findings on mental status examination (see Ex. C-13F, p.5 (only fund of
24 knowledge, insight, and judgment not within normal limits)).” Tr. 185-86. It
25 appears the ALJ may have intended to state the opinion was internally *inconsistent*,
26 given the context of the rest of the paragraph. Because it is unclear, the Court will
27 not address this reasoning. The issue can be resolved without consideration of this
28 factor.

1 considered the unremarkable exam findings by both doctors, and that temporary
 2 limitations are insufficient to meet the durational requirement. *Id.*

3 As this claim is being remanded on other bases, the ALJ will be required to
 4 evaluate the record as a whole, including Dr. Wachsmuth and Dr. Cline. The Court
 5 notes that each opinion was an estimate of the expected duration of impairment
 6 with available treatment, and durational predictions cannot be considered in a void.
 7 While a temporary restriction is of limited value, *Carmickle v. Comm'r, Soc. Sec.*
 8 *Admin*, 533 F.3d 1155, 1165 (9th Cir. 2008), it is not clear that the assessed
 9 limitations *in fact* did not persist past the projected period.

10 ***e. Drs. Kraft and Eisenhauer, state agency reviewing doctors***

11 At the initial and reconsideration levels of review, the state agency doctors
 12 found Plaintiff capable of handling simple and complex instructions, and
 13 sustaining adequate concentration, persistence, and pace, with occasional slowing
 14 due to his subjective experience of pain and dysphoria. Tr. 266-67, 284-85. The
 15 ALJ gave these opinions some weight, finding them generally consistent with the
 16 medical evidence of record, but noted that a number of exhibits were submitted
 17 after they made their determinations. Tr. 185.

18 Plaintiff argues it was appropriate for the ALJ to give these opinions less
 19 than full weight since they were non-examining sources and they did not review
 20 most of the record. ECF No. 13 at 13. But Plaintiff argues the ALJ erred in failing
 21 to account for their assessment of “occasional slowing.” *Id.* Plaintiff asserts this
 22 implies that he would be slow up to one-third of the time and would thus be unable
 23 to maintain functioning for an adequate 8-hour workday. *Id.* at 8. Defendant argues
 24 the notation of occasional slowing was not a functional limitation but rather a
 25 factor that justified the mental RFC limitations assessed by the doctors. ECF No.
 26 14 at 14.

27 The Court finds the ALJ did not err. Plaintiff’s interpretation of the
 28 limitations from the state doctors does not appear to be consistent with the context,

1 particularly considering the claim would have been approved at the earlier stages
 2 had the doctors intended to assess disabling limitations. However, on remand, the
 3 ALJ will consider the record as a whole in reevaluating the medical opinion
 4 evidence.

5 ***f. Physical opinions***

6 Two of Plaintiff's treating providers, Dr. Crank and Ms. Bruce, completed
 7 medical source statements opining he was limited to sedentary work. Tr. 515, 707.
 8 Dr. Crank's opinion was reviewed by a DSHS doctor, Dr. Thompson, and
 9 affirmed. Tr. 727-28.

10 The ALJ gave some weight to Dr. Crank and little weight to Ms. Bruce, and
 11 did not discuss Dr. Thompson. Tr. 184-85. The ALJ found Dr. Crank and Ms.
 12 Bruce's opinions were inconsistent with objective findings and contradicted by
 13 other opinions in the record. *Id.*

14 Plaintiff argues the ALJ improperly disregarded the objective evidence that
 15 did support the opinions and improperly substituted her own assessment of the
 16 objective evidence for that of the treating sources. ECF No. 13 at 14-18. He further
 17 argues that the examining and non-examining source opinions should not have
 18 been given more weight than the treating sources, and points out the ALJ failed to
 19 consider the opinions' consistency with one another, or to address Dr. Thompson's
 20 opinion at all. *Id.* Defendant argues the ALJ reasonably considered the objective
 21 evidence and the other opinion evidence in weighing the various physical opinions.

22 As this claim is being remanded for further proceedings, the ALJ will
 23 reconsider the record as a whole, including any updated evidence, and reevaluate
 24 the weight owed to each medical opinion.

25 **2. Plaintiff's subjective statements**

26 Plaintiff contends the ALJ erred by improperly rejecting his subjective
 27 complaints. ECF No. 13 at 18-21.

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1 It is the province of the ALJ to make credibility determinations. *Andrews v.*
2 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be
3 supported by specific, cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231
4 (9th Cir. 1990). Once the claimant produces medical evidence of an underlying
5 medical impairment, the ALJ may not discredit testimony as to the severity of an
6 impairment merely because it is unsupported by medical evidence. *Reddick v.*
7 *Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence of
8 malingering, the ALJ's reasons for rejecting the claimant's testimony must be
9 "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir.
10 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). "General findings are
11 insufficient: rather the ALJ must identify what testimony is not credible and what
12 evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*
13 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

14 The ALJ concluded Plaintiff's medically determinable impairments could
15 reasonably be expected to cause the alleged symptoms; however, Plaintiff's
16 statements concerning the intensity, persistence and limiting effects of those
17 symptoms were not entirely consistent with the medical evidence and other
18 evidence in the record. Tr. 181. The ALJ found Plaintiff's allegations to be
19 undermined by the unsupportive objective medical evidence, Plaintiff's
20 conservative course of treatment and lack of willingness to follow treatment
21 recommendations, inconsistencies in his presentation and use of his cane, and his
22 overall weak work history. Tr. 181-82.

23 The Court finds the ALJ offered clear and convincing reasons for
24 discounting Plaintiff's subjective allegations. An ALJ may consider a claimant's
25 poor work history in evaluating his allegations of inability to work for medical
26 reasons. *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002). Plaintiff had
27 minimal earnings even before his on-the-job injury in the mid-2000s. Tr. 383.
28 While Plaintiff asserts this poor work history is related to his mental impairments

1 and inability to get along with others, there is no evidence to support this allegation
2 other than Plaintiff's own statements.

3 Unexplained or inadequately explained reasons for failing to seek medical
4 treatment or follow a prescribed course of treatment can cast doubt on a claimant's
5 subjective complaints. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). Plaintiff
6 failed to heed medical recommendations regarding diet, exercise, smoking,
7 marijuana use, and participation in physical therapy. Tr. 590, 675, 743-47, 770,
8 847. Plaintiff argues that lifestyle recommendations cannot be the basis for finding
9 a claimant failed to follow treatment, based on Social Security Ruling (SSR) 18-
10 3p. ECF No. 13 at 20. However, this ruling only applies to a finding that a claimant
11 is not eligible for benefits based on only being disabled because of a failure to
12 follow treatment that is expected to restore their ability to work. SSR 18-3p. An
13 ALJ may still consider a claimant's efforts to address their impairments in
14 assessing whether they are truly as limited as alleged.

15 Although it cannot serve as the sole ground for rejecting a claimant's
16 symptom statements, objective medical evidence is a "relevant factor in
17 determining the severity of the claimant's pain and its disabling effects." *Rollins v.*
18 *Massanari*, 261 F.3d 853, 857 (9th Cir. 2001). The ALJ reasonably interpreted
19 objective findings in the record as being inconsistent with Plaintiff's alleged
20 disabling symptoms.

21 The Court therefore finds the ALJ did not err in her evaluation of Plaintiff's
22 subjective reports. However, as this claim is being remanded for further
23 consideration of the medical evidence and development of the record, the ALJ will
24 reconsider Plaintiff's subjective reports in conducting the five-step sequential
25 evaluation process.

26 **3. Unexhibited evidence**

27 Plaintiff argues the ALJ and the Appeals Council both erred in failing to
28 consider and exhibit additional evidence submitted after the hearing and after the

1 ALJ denied the claim. ECF No. 13 at 3-5. Because this claim is being remanded on
2 other bases, Plaintiff will have the opportunity to submit this evidence and fully
3 develop the record prior to the remand hearing. The ALJ will consider the fully
4 developed record in making a new decision.

5 **4. Step five findings**

6 At step five of the sequential evaluation process the Commissioner must
7 show that there are jobs that exist in significant numbers in the national economy
8 that the claimant is capable of performing, taking into consideration the claimant's
9 residual functional capacity, age, education, and work experience. *Tackett v. Apfel*,
10 180 F.3d 1094, 1100 (9th Cir. 1999). To meet this burden, the ALJ may rely on a
11 vocational expert's testimony that is based on a hypothetical that contains all of the
12 limitations the ALJ found credible and supported by substantial evidence in the
13 record. *Bayliss v Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005).

14 In making the step five findings, the ALJ has an affirmative responsibility to
15 ask the vocational expert about any possible conflict between the provided
16 testimony and information contained in the Dictionary of Occupational Titles
17 (DOT). Social Security Ruling 00-4p. "When there is an apparent conflict between
18 the vocational expert's testimony and the DOT—for example, expert testimony
19 that a claimant can perform an occupation involving DOT requirements that appear
20 more than the claimant can handle—the ALJ is required to reconcile the
21 inconsistency." *Lamear v. Colvin*, 865 F.3d 1201, 1206 (9th Cir. 2017).

22 In response to a hypothetical question that matched the ultimately adopted
23 RFC, the vocational expert identified three jobs: small products assembler, collator
24 operator, and house sitter. Tr. 232. The ALJ adopted the three occupations at step
25 five. Tr. 187.

26 Plaintiff argues the job requirements regarding reaching for each of the jobs
27 exceed the limitations in the RFC regarding Plaintiff's ability to use his right arm,
28 and the ALJ failed to acknowledge or resolve the discrepancy. ECF No. 13 at 21.

1 Plaintiff also notes that the DOT code provided for the house sitter job does not
 2 exist in the DOT. *Id.* Defendant argues the error on the DOT code does not render
 3 the findings meaningless, as it was clearly a matter of a typo on a single digit of the
 4 code. ECF No. 14 at 20. Defendant further argues that the ALJ reasonably resolved
 5 the conflicts, relying on the vocational expert's statement that where her testimony
 6 deviated from the DOT it was based on her experience and research in the field. *Id.*
 7 at 21.

8 The ALJ found Plaintiff could never reach overhead with his right arm,
 9 could occasionally reach at chest level with his right arm, and had no limitations in
 10 reaching below chest level. Tr. 180-81. All three of the jobs identified by the
 11 vocational expert and adopted at step five require frequent reaching. *See* Selected
 12 Characteristics of Occupations Defined in the Revised Dictionary of Occupational
 13 Titles, U.S. Department of Labor 134, 284, 368 (1993).⁴ This is an apparent
 14 conflict between the vocational expert's testimony and the DOT.

15 At the hearing, the ALJ and the vocational expert had the following
 16 exchange regarding conflicts with the DOT:

17 ALJ: And does any – well, I shouldn't say, does any – obviously
 18 some of your testimony dickers [sic] from the information
 19 found in the Dictionary of Occupational Titles since I know at
 20 the very least the Dictionary of Occupational Titles doesn't talk
 21 about the ability to alternate sitting and standing. So, from
 22 where do you get your knowledge or information that these jobs
 23 would fit within all of my hypothetical limitations?

24 ⁴ The Selected Characteristics of Occupations includes information
 25 regarding the physical demands of each occupation, including reaching (RE), with
 26 the frequency of the demand for each activity designated as never (N), occasional
 27 (O), frequent (F) or constant (C). *See* Selected Characteristics of Occupations
 28 Defined in the Revised Dictionary of Occupational Titles, U.S. Department of
 Labor, Appendix C (1993).

1 VE: That's based on my 28 years of vocational experience in
2 actually assisting or assessing individuals in the specific
3 positions.

4 ALJ: Have you performed any job analyses on these positions?

5 VE: Yes, numerous.

6 ALJ: Have you done labor market surveys on these positions?

7 VE: Yes.

8 ALJ: Have you actually observed the jobs being done?

9 VE: Yes.

10 Tr. 232-33. Upon questioning from Plaintiff's representative, the vocational expert
11 acknowledged that the collator operator job and small products assembler job both
12 required frequent reaching. Tr. 233-34.

13 In the decision, the ALJ found that "the vocational expert's testimony is
14 consistent with the information contained in the Dictionary of Occupational
15 Titles." Tr. 187. While the vocational expert's testimony and past experience are
16 likely sufficient to provide a basis for the decision, the ALJ failed to acknowledge
17 or resolve the inconsistencies that the vocational expert herself identified. On
18 remand, the ALJ shall inquire as to any conflicts between the vocational expert's
19 testimony and the DOT, and resolve any conflicts prior to relying on the testimony.

CONCLUSION

20 Plaintiff argues the decision should be reversed and remanded for the
21 payment of benefits. The Court has the discretion to remand the case for additional
22 evidence and findings or to award benefits. *Smolen v. Chater*, 80 F.3d 1273, 1292
23 (9th Cir. 1996). The Court may award benefits if the record is fully developed and
24 further administrative proceedings would serve no useful purpose. *Id.* Remand is
25 appropriate when additional administrative proceedings could remedy defects.
26 *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). In this case, the Court
27 finds that further development is necessary for a proper determination to be made.

28 The ALJ's decision is not supported by substantial evidence. On remand, the
ALJ shall reevaluate the medical evidence and Plaintiff's subjective complaints,

1 making findings on each of the five steps of the sequential evaluation process,
2 obtain supplemental testimony from a vocational expert as needed, and take into
3 consideration any other evidence or testimony relevant to Plaintiff's disability
4 claim.

5 Accordingly, **IT IS ORDERED:**

6 1. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is

7 **GRANTED IN PART.**

8 2. Defendant's Motion for Summary Judgment, **ECF No. 14**, is

9 **DENIED.**

10 3. The matter is **REMANDED** to the Commissioner for additional
11 proceedings consistent with this Order.

12 4. An application for attorney fees may be filed by separate motion.

13 The District Court Executive is directed to file this Order and provide a copy
14 to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and
15 the file shall be **CLOSED**.

16 **IT IS SO ORDERED.**

17 DATED August 11, 2020.



A handwritten signature in black ink, appearing to read "M", is placed above a horizontal line.

18
19 JOHN T. RODGERS
20 UNITED STATES MAGISTRATE JUDGE
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